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Liew Poon Siak v Low Hing King & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–23–47 OF 2002

B BALIA YUSOF J

19 OCTOBER 2009

C *Tort — Defamation — Fair comment — Publication of defamatory article in newspaper — Whether facts truly stated — Whether highly relevant fact omitted — Whether publication made to smear plaintiff's name and reputation — Whether defendant actuated by malice*

D *Tort — Defamation — Justification — Publication of defamatory article in newspaper — Whether justifications made out on facts — Whether truth of all material statements established*

E *Tort — Defamation — Libel — Test for — Whether words referred to plaintiff — Objective test based on fair minded ordinary reader — Whether words defamatory — Whether words used had tendency to excite against plaintiff's adverse opinion of others — Whether defendant responsible for publication*

F *Tort — Defamation — Qualified privilege — Publication of defamatory article in newspaper — Whether publication was with right and honest motives and without malice*

G The first defendant and a few others had held a meeting cum press conference. A news report of the said meeting cum press conference was carried out and published in the *China Press* newspaper. The plaintiff was at the material time the chairman of the Confucian School Oldboys Association ('the association'). The plaintiff claimed that there were three paragraphs in

H the said publication which were defamatory to him in the following manner: (i) in the first paragraph, the first defendant had stated that there was turbulence at the Confucian Private Secondary School which was caused by a small group of decadents and saboteurs which referred to the plaintiff as one of them; (ii) in the second paragraph, the first defendant had stated that the

I plaintiff was in collusion with each other and made no contribution to the development of the school and had brought disgrace to the association; and (iii) in the third paragraph, the first defendant had stated that the plaintiff had misappropriated the school building fund donated by the association by assigning ten members and non-members to be the permanent sponsors. By

the said publication the plaintiff averred that he had been portrayed as an irresponsible, untrustworthy and a dishonest person. Hence, the plaintiff claimed damages for defamation. The first defendant pleaded the defences of fair comments upon a matter of public interest, justification and qualified privilege.

Held, allowing the plaintiff's claim with costs:

(1) For the plaintiff to succeed, the following had to be established: (i) did the words refer to the plaintiff; (ii) were the words complained of defamatory; and (iii) was the defendant responsible for the publication (see para 6).

(2) It was for the plaintiff to establish objectively that he was the person referred to by the words used in the publication. The test is an objective one. The ordinary reader must be fair minded and not an avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief the words refer to the plaintiff. It was beyond any shadow of doubt that the said article referred specifically to the plaintiff by his name as well as to his position as chairman of the association (see paras 7–8).

(3) As to whether the words complained of were capable of being, and were, in fact, defamatory of the plaintiff, the test is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally. Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Words could still be defamatory even if they did not really lower a plaintiff in the estimation of those to whom they were published. The law looks only to its tendency. The words in question here were defamatory to the plaintiff. The plaintiff had been referred to as a decadent, saboteur, a trouble maker, a disgrace to the association and that he had misappropriated the school building funds (see paras 10–11).

(4) The first defendant initiated and organised the press conference. The circumstances showed that the first defendant was responsible for the publication. DW4 was a press reporter and the giving of the script to DW4 by the first defendant was sufficient to constitute 'circumstances in which the defendant is responsible for the publication'. The first defendant must have intended that it be published in the newspaper (see para 12).

(5) In order to succeed in a defence of justification, the defendant must establish the truth of all material statements in the words complained

of. There is no burden on the plaintiff to prove that the defamatory words are false. The law presumes that the defamatory words are false. The defendant therefore must rebut the presumption by proving the particulars in support of the plea of justification. In the circumstances of the present case, the plea of justification had no merits (see paras 13–14).

(6) For a plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. The comment must not mistake facts. The omission of a highly relevant fact may amount to such a misstatement. The defendant cannot avail himself of any facts as justifying his comment of which he was ignorant at the time when he published the words complained of. It is the state of mind of a defendant when he published the defamatory words that is most material. The publication of the defamatory statements was done with a purpose to smear the plaintiff's name and reputation. The first defendant had been actuated by malice and the defence of fair comment was not available to him (see paras 15 & 17–18).

(7) As for the defence of qualified privilege, it must be shown that the publication was with right and honest motives and without malice. When making the statements, the first defendant was driven with some improper or ulterior motives. It was not honestly made for the common convenience or welfare of the association or out of his social or moral obligations. It was made to attack the plaintiff and urging members of the association to condemn the plaintiff. Thus, the first defendant could not avail himself of the defence of qualified privilege (see para 21).

[Bahasa Malaysia summary

Defendan pertama dan beberapa orang lain telah mengadakan mesyuarat yang juga sidang akhbar. Satu laporan berita mesyuarat yang juga sidang akhbar telah dijalankan dan diterbitkan dalam akhbar *China Press*. Plaintif pada masa matan merupakan pengerusi Persatuan Pelajar Lama Sekolah Confucian ('persatuan'). Plaintif telah mendakwa bahawa terdapat tiga perenggan dalam penerbitan tersebut yang berunsur fitnah terhadapnya dalam cara berikut: (i) dalam perenggan pertama, defendan pertama telah mengatakan bahawa terdapat pergolakan di Sekolah Menengah Swasta Confucian yang disebabkan oleh sekumpulan kecil orang yang tidak bermoral dan pensabotaj yang merujuk kepada plaintif sebagai salah seorang daripada mereka; (ii) dalam perenggan kedua, defendan pertama telah mengatakan bahawa plaintif telah bertelagah antara satu sama lain dan tidak menyumbang kepada pembangunan sekolah dan telah memalukan persatuan; dan (iii) dalam perenggan ketiga, defendan pertama telah mengatakan bahawa plaintif telah melesapkan dana bangunan sekolah yang telah disumbangkan oleh persatuan dengan melantik sepuluh orang ahli dan

bukan ahli untuk menjadi penganjur tetap. Dengan penerbitan tersebut plaintif menegaskan bahawa dia telah digambarkan sebagai seorang yang tidak bertanggungjawab, tidak boleh dipercayai dan tidak jujur. Justeru itu, plaintif menuntut ganti rugi untuk fitnah. Defendan pertama merayu pembelaan komen adil berdasarkan kepentingan awam, justifikasi dan perlindungan bersyarat.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Untuk plaintif berjaya, berikut perlu dibuktikan: (i) sama ada perkataan-perkataan tersebut merujuk kepada plaintif; (ii) sama ada perkataan-perkataan yang diadukan berunsur fitnah; dan (iii) sama ada defendan bertanggungjawab untuk penerbitan itu (lihat perenggan 6).

(2) Plaintif perlu membuktikan secara objektif bahawa dialah orang yang dirujuk oleh perkataan-perkataan yang digunakan dalam penerbitan tersebut. Ujian ini berbentuk objektif. Pembaca biasa perlulah seorang yang berfikiran adil dan tidak cenderung mencari skandal. Dia tidak boleh merupakan seorang yang berasa syak secara tidak wajarnya. Pembaca biasa perlu mempunyai alasan-alasan rasional tentang kepercayaannya bahawa perkataan-perkataan tersebut merujuk kepada plaintif. Ianya melampaui apa-apa keraguan bahawa artikel tersebut merujuk secara khusus kepada plaintif melalui namanya dan juga jawatannya sebagai pengerusi persatuan itu (lihat perenggan 7–8).

(3) Berhubung sama ada perkataan-perkataan yang diadukan mampu membawa, dan adalah, pada hakikatnya berunsur fitnah terhadap plaintif, ujiannya adalah sama ada perkataan-perkataan yang diadukan dianggap telah mendedahkannya untuk dibenci, dimalukan atau dihina oleh seorang yang berfikiran waras atau bertujuan untuk merendah-rendahkan plaintif dalam anggapan orang awam yang berfikiran wajar secara amnya. Oleh itu ujian sifat kenyataan yang berunsur fitnah adalah kecenderungannya untuk menimbulkan pendapat bertentangan orang lain terhadap plaintif, meskipun tiada sesiapa mempercayai yang kenyataan itu benar. Perkataan-perkataan masih boleh berunsur fitnah meskipun ia tidak semestinya merendah-rendahkan plaintif dalam anggapan mereka yang mana perkataan-perkataan itu diterbitkan. Undang-undang hanya melihat kepada kecenderungannya. Perkataan-perkataan yang dipersoalkan di sini berunsur fitnah terhadap plaintif. Plaintif telah dirujuk sebagai orang yang tidak bermoral, pensabotaj, seorang yang suka mencari masalah, memalukan persatuan dan bahawa dia telah melesapkan dana bangunan sekolah (lihat perenggan 10–11).

(4) Defendan pertama telah memulakan dan menganjurkan sidang akhbar. Keadaan menunjukkan bahawa defendan pertama bertanggungjawab untuk penerbitan itu. DW4 merupakan pemberita akhbar dan

A pemberian skrip kepada DW4 oleh defendan pertama mencukupi untuk membentuk 'circumstances in which the defendant is responsible for the publication'. Defendan pertama semestinya telah bertujuan agar ia diterbitkan dalam akhbar (lihat perenggan 12).

B (5) Untuk berjaya dalam pembelaan justifikasi, defendan hendaklah membuktikan kebenaran semua kenyataan material tentang perkataan-perkataan yang diadukan itu. Tiada beban ke atas plaintif untuk membuktikan bahawa perkataan-perkataan berunsur fitnah adalah palsu. Undang-undang menganggap bahawa
C perkataan-perkataan berunsur fitnah adalah palsu. Defendan oleh itu mesti mematahkan andaian itu dengan membuktikan butiran yang menyokong pli justifikasi. Berdasarkan keadaan kes ini, pli justifikasi tidak mempunyai merit (lihat perenggan 13–14).

D (6) Dalam pli komen adil fakta-fakta hendaklah dinyatakan dengan benar. Jika fakta-fakta di mana komen bertujuan dibuat tiada asas pli akan gagal. Komen itu tidak boleh tersilap fakta. Peninggalan fakta paling relevan boleh membentuk kenyataan salah nyata. Defendan tidak boleh menggunakan apa-apa fakta untuk menjustifikasikan komennya yang
E dia tidak mempunyai pengetahuan pada masa dia menerbitkan perkataan-perkataan yang diadukan itu. Keadaan minda defendan apabila dia menerbitkan perkataan-perkataan fitnah itulah yang paling penting. Penerbitan kenyataan berunsur fitnah telah dilakukan dengan tujuan merosakkan nama dan reputasi plaintif. Defendan pertama telah
F didorong oleh niat jahat dan pembelaan komen adil tidak boleh diberikan kepadanya (lihat perenggan 15 & 17–18).

(7) Untuk pembelaan perlindungan bersyarat, perlu ditunjukkan bahawa penerbitan itu mempunyai motif-motif yang jujur dan benar dan tanpa
G niat jahat. Apabila membuat kenyataan, defendan pertama didorong oleh motif yang tidak elok atau tersembunyi. Ia tidak dibuat secara jujur untuk kesenangan umum atau kebajikan persatuan atau atas dasar tanggungjawab social atau moralnya. Ia dibuat untuk mengenakan plaintif dan menggesa ahli-ahli persatuan mengecam plaintif. Oleh itu,
H defendan pertama tidak boleh menggunakan pli perlindungan bersyarat (lihat perenggan 21).]

Notes

For cases on fair comment, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras
I 335–342.

For cases on justification, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 363–367.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576–590.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142, HC (refd)
Adam v Ward [1917] AC 309, HL (refd)
Dato' Seri Anwar Ibrahim v Dato Seri Dr Mahathir Mohamad [1999] 4 MLJ 58; [1999] 7 CLJ 32, HC (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd [1993] 1 MLJ 408; [1993] 2 CLJ 365, HC (refd)
Lee Kuan Yew v Derek Gywn Davies & Ors [1990] 1 MLJ 390, HC (refd)
Morgan v Odhams Press Ltd & Anor [1971] 1 WLR 1239, HL (refd)
Rajagopal v Rajan [1972] 1 MLJ 45, FC (refd)
Slim & Ors v Daily Telegraph Ltd & Anor [1968] 2 QB 157, CA (refd)
Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393; [1995] 1 LNS 304, HC (folld)

ST Lee (ST Lee & Partners) for the plaintiff.
Arthur Wang Ming Way (Arthur Wang, Lian & Associates) for the first defendant.

Balia Yusof J:

BACKGROUND FACTS

[1] On 16 April 2002 the first defendant together with a few others held a meeting cum press conference titled 'The Turbulence of the Special General Meeting of Confucian School Accused of Making Use of Old Boys Associations Name to Create Trouble Law Hing King Condemns the Saboteurs'. A news report of the said meeting cum press conference was carried out and published in the *China Press* newspaper on 18 April 2002. The plaintiff was at the material time the chairman of the Confucian School Oldboys Association. It is averred by the plaintiff that there are three paragraphs in the said publication which are defamatory to him in the following manner:

(a) In the first paragraph, the first defendant has imputed that there was turbulence at the Confucian Private Secondary School which is caused by a small group of decadents and saboteurs which refer to the plaintiff as one of them.

(b) In the second paragraph, the first defendant states that the plaintiff was in collusion with each other and makes no contribution to the development of the school and has brought disgrace the Oldboys Association.

A (c) In the third paragraph, the first defendant has stated that the plaintiff had misappropriated the school building fund donated by the Oldboys Association by assigning ten members and non members to be the permanent sponsors.

B **[2]** By the said publication the plaintiff avers that he has been portrayed as an irresponsible, untrustworthy and a dishonest person. The plaintiff's image and reputation has been injured and him being put to hatred, ridicule and contempt. Henceforth, the plaintiff claims against the first defendant damages in the sum of one million ringgit including exemplary damages with
C interest and costs.

[3] The plaintiff's claim against the second, third and fourth defendants has been withdrawn. The case against the first defendant is heard only on the issue of liability. Damages will be assessed by the *Timbalan Pendaftar*.
D

[4] By his defence, the fourth defendant denies having held a press conference on 16 April 2002 and denies that the words mentioned in the said three paragraphs of the publication bore or were understood to bear the
E meaning as alleged by the plaintiff. Further and in the alternative the first defendant contends that those words constituted fair comments upon a matter of public interest. The first defendant further pleads justification and qualified privilege as part of his defence.

F THE PUBLICATION

[5] It is pertinent to consider what the alleged publication was and reproduced below is the translation of the relevant part of the said publication which appeared in the *China Press* newspaper dated 18 April 2002.

G

CHINA PRESS

18.4.2002 (Thursday)

THE TURBULENCE OF

H THE SPECIAL GENERAL MEETING OF CONFUCIAN SCHOOL

ACCUSED OF MAKING USE OF OLDBOYS' ASSOCIATION'S NAME

TO CREATE TROUBLE

LAW HING KING CONDEMNS THE SABOTEURS

I

(Kuala Lumpur – 17th)

An old boy Law Hing King pointed out that the turbulence of Confucian Private Secondary School that occurred one after another was due to a small group of decadents and saboteurs.

He said that these people had become the directors of Confucian Private Secondary School in the name of the Oldboys' Association and had created a lot of trouble. They have acted in collusion with each other and made no contribution to the development of the old school. This has brought disgrace to the oldboy's association.

He pointed out that what is more surprising is that the existing Chairman, Liew Poon Siak had misappropriated the school building funds donated to the old school by the Oldboys' Association. He had assigned 10 members and non-members to be the permanent sponsors. Any oldboy has the right to condemn this sort of illegal action.

FINDINGS

[6] It is trite that for the plaintiff to succeed, the following must be established, that is to say:

(a) Do the words refer to the plaintiff.

(b) Are the words complained of defamatory.

(c) Is the defendant responsible for the publication.

DO THE WORDS REFER TO THE PLAINTIFF

[7] It is for the plaintiff to establish objectively that he was the person referred to by the words used in the publication (see *Lee Kuan Yew v Derek Gywn Davies & Ors* [1990] 1 MLJ 390; *Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd* [1993] 1 MLJ 408; [1993] 2 CLJ 365). Are the words capable of being understood to refer to the plaintiff? The test is an objective one. The ordinary reader must be fair minded and not an avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief the words refer to the plaintiff (see *Morgan v Odhams Press Ltd & Anor* [1971] 1 WLR 1239).

[8] Its is beyond any shadow of doubt that the article published in the *China Press* newspaper dated 18 April 2002 refers specifically to the plaintiff (pp 4–7 of the ikatan dokumen bersama). It refers to the plaintiff by his name as well as to the plaintiff's position as the chairman of the Old boys Association.

ARE THE WORDS COMPLAINED OF DEFAMATORY

[9] The words complained of by the plaintiff are only in respect of the first three paragraphs of the publication. The words complained of in the said paragraphs must be understood to mean in their natural and ordinary meaning, a meaning in which reasonable men of ordinary intelligence, or

worldly affairs, would be likely to understand them. In *Slim & Ors v Daily Telegraph Ltd & Anor* [1968] 2 QB 157, Diplock LJ at p 172 said:

> What is the natural and ordinary meaning of words for the purpose of the law of libel? One can start by saying that the meaning intended to be conveyed by the publisher of the words is irrelevant.

[10] In *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub Bre Sdn Bhd & Ors* [1996] 1 MLJ 393; [1995] 1 LNS 304, His Lordship Richard Malanjum J (as he then was) at pp 402–403 (MLJ) said:

> The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable person using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw (see *Jones v Skelton* [1963] 3 All ER 952; *Kemsley v Foot* [1952] 1 All ER 501; *Rajagopal v Rahab* [1972] 1 MLJ 45). It is irrelevant what the publisher intended the words complained of to mean (see *Capital & Counties Bank v Henty* (1882) 7 App Cas 741; *Grubb v Bristol United Press Ltd* [1963] 1 QB 309; *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226). It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334). There is also no necessity for a plaintiff to prove falsity of the words complained of once they are found to be defamatory of him (see *Abdul Rahman Talib v Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142).
>
> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see *JB Jeyaratnam*). Mohamed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 at p 58 said:
>
> > Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.
> >
> > Words could still be defamatory even if they did not really lower a plaintiff in the estimation of those to whom they were published. The law looks only to its tendency (see *JB Jeyaretnam v Goh Chok Tong*; *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor*).

[11] I am of the view that the words referred to in the said three paragraphs of the publication are defamatory to the plaintiff. Those words tend to lower the plaintiff in the estimation of right thinking members of the public generally and tend to expose the plaintiff to hatred, contempt or ridicule. The plaintiff has been referred to as a decadent, saboteur, a trouble maker, a disgrace to the Oldboy's Association and has misappropriated the school building funds.

IS THE DEFENDANT RESPONSIBLE FOR THE PUBLICATION

[12] It is the defendant's contention that he was not responsible for the publication of the said defamatory words. The evidence before this court is overwhelmingly clear that it was the first defendant who initiated and organised the press conference or meeting on 16 April 2002. DW4 testified that the first defendant gave her the script before the start of the meeting. The script contains the speech of the first defendant in the said press conference/meeting as exhibited at p 37 of the common bundle of document in encl 36. In order to establish a prima facie case in an action for libel or slander, it is necessary for the plaintiff to prove that the words were published by the defendant or in circumstances in which the defendant is responsible for the publication. In the circumstances of the case, I am of the view that the circumstances show that the first defendant is responsible for the publication. DW4 is a press reporter and the giving of the script to DW4 is sufficient to constitute 'circumstances in which the defendant is responsible for the publication'. The first defendant must have intended that it be published in the newspaper.

JUSTIFICATION

[13] In order to succeed in a defence of justification, the defendant must establish the truth of all material statements in the words complained of. There is no burden on the plaintiff to prove that the defamatory words are false. The law presume that the defamatory words are false. The defendant therefore must rebut the presumption by proving the particulars in support of the plea of justification. It is for the defendant to show that the statement complained of was substantially true and so he was justified in making the statements.

[14] In so far as the evidence goes, the first defendant has only attempted to justify the third paragraph of the defamatory statement in relation to the words 'misappropriated the school building funds'. The first defendant himself and all the other defence witnesses laboured on the issue that it was the truth that the plaintiff did attempt to nominate ten sponsorship forms for ten individuals from the donation of RM50,000 to the school. While that

may be true, to allege that the plaintiff has misappropriated the school building fund is a different matter altogether. On the contrary, the evidence clearly show that it was the Oldboy's Association decision to submit the sponsorship application to the school's board of governors. The Oldboy's Association held a meeting on 19 August 2001 in which the committee decided that the plaintiff submit the application. The said application was however rejected by the board in a meeting held on 6 January 2002. I find it to be highly improbable that neither the first defendant nor any of the defence witnesses; DW2 who is the president of the PIBG and vice president of the board of governors and DW3 who is the ex president of the association, ex member of the board of governors and an active member of the association not knowing about the committee meeting on 10 August 2001 and the rejection by the board of governors. In the light of this, there is evidently not a grain of truth as what was stated in the statement complained of. On the words depicting the plaintiff as a saboteur, a decadent, a trouble maker and bringing disgrace to the Oldboy's Association not a shred of evidence has been produced to support the first defendant's plea of justification. In the circumstances, I find the plea of justification has no merits.

FAIR COMMENT

[15] In the alternative, the first defendant pleads the statement is not defamatory but a fair and honest comment consisting of true facts and inferences from such facts. Gatley on *Libel and Slander*, (9th Ed) at p 257 states as follows:

> In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. The comment must not mistake facts, because a comment cannot be fair which is built upon facts which are not truly stated. If the defendant makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair. The omission of a highly relevant fact may amount to such a misstatement.

[16] In *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v Bre Sdn Bhd Ors* it was stated that:

> For the defence of fair comment, in order to succeed the following basic elements must be established by the defendants, namely:
>
> (a) that the words complained of are comments, though they may consist of or include inference of facts;
>
> (b) that the comments are on a matter of public interest; and
>
> (c) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved (see *JB Jeyaretnam*).

> On element (i), it is settled law that the comment is a statement of opinion on facts truly stated. A libelous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v JB Jeyaretnam* [1978] 1 LNS 93; [1979] 1 MLJ 281). In order to decide whether a statement is capable of being a comment or a statement of facts, should be gathered from the document wherein the words complained of are found. There is no necessity to look at other documents, though relevant, to come to such determination (see *Telnikoff v Matusevitch* [1991] 4 All ER 871).

[17] The defendant cannot avail himself of any facts as justifying his comment of which he was ignorant at the time when he published the words complained of. It is the state of mind of a defendant when he published the defamatory words that is most material (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142). Where the defendant knew the publication to be false or where the defendant made the publication recklessly, being indifferent to the truth of what he published and neither considering nor caring whether it was true or not or whether he knew the publication to be false, the defence of fair comment will fail. Neither will the defendant succeed where the statement was not honestly made or where there is malice.

[18] I find it proven that the defamatory statements were made with malice or inference of malice on the part of the first defendant. The first defendant was intent of displacing the plaintiff from the position of chairman of the Oldboy's Association, a position which he occupied after the ouster of the plaintiff in a special general meeting following the press conference/meeting held on 16 April 2002. The publication of the defamatory statements by the first defendant was a prelude to the removal of the plaintiff as chairman of the association and done with a purpose to smear the plaintiff's name and reputation. The words against the plaintiff are far from being a fair comment honestly made on a matter of public interest. In my view, there is evidence to warrant the conclusion that the first defendant had been actuated by malice and that the defence of fair comment is not available to him.

QUALIFIED PRIVILEGE

[19] In *Adam v Ward* [1917] AC 309 at p 334 Lord Atkinson opined:

> A privilege occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[20] In *Dato' Seri Anwar Ibrahim v Dato Seri Dr Mahathir Mohamad* [1999] 4 MLJ 58; [1999] 7 CLJ 32, RK Nathan J stated at p 71 (MLJ); p 41 (CLJ):

> In assessing whether the defence of qualified privilege applies, the Court of Appeal in *Reynolds v Times Newspaper Ltd* [1998] 3 WLR 863 determined that the following question need to be answered in relation to any individual occasion. Lord Bingham of Cornhill CJ in handing down the judgment of the court said at p 899 as follows:
>
> (a) Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test).
>
> (b) Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test).
>
> (c) Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this the circumstantial test).

[21] The first defendant contends the occasion on which the statements were made was without malice and of qualified privilege. Being a member of the Oldboys Association, the first defendant has a duty either legal, social or moral to make the statements and the members of the association has a reciprocal interest to receive them. It is trite one of the tests to be applied for the application of this defence is that the publication must be with right and honest motives and without malice (see also *Rajagopal v Rajan* [1972] 1 MLJ 45). As I have found earlier, when making the statements, the first defendant was driven with some improper or ulterior motives. 'Malice which avoids qualified privilege is will or spite or any indirect or improper motive in the mind of the defendant at the time of publication and actuating it' (*Halsbury's Laws of England* (3rd Ed) Vol 24 s 138 p 79). It was not honestly made for the common convenience or welfare of the association or out of his social or moral obligations. It was made to attack the plaintiff and urging members of the association to condemn the plaintiff. Under these circumstances I do not think the first defendant can avail himself of the defence of qualified privilege.

[22] For the reasons stated above, on the issue of liability I rule the first defendant to be liable and as to damages, I hereby make a further order that the same to be assessed by the *Timbalan Pendaftar*. I also order that interest

at a rate of 8%pa be awarded on the damages from the date of this judgment until full realisation and costs to the plaintiff.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum